(P) 95-1086

Supreme Court, U.S.
FILED
JAN 2 1996
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

EMILY DISTAJO, et al.,

Petitioners,

v.

DOCTOR'S ASSOCIATES, INC.,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Second Circuit

SUPPLEMENTAL APPENDIX

David M. Duree*
Reinert & Duree, P.C.
812 North Collins
St. Louis, MO 63102-2174
(314) 621-5743
Counsel for Petitioners

*Counsel of Record

January 2, 1996

147 pp

TABLE OF CONTENTS

Page

ARGUMENT POINT VI OF PETITIONER'S SECOND CIRCUIT BRIEF AS APPELLANTS IN APPEAL NUMBER 94-9207-L. 56a

ARGUMENT POINT VII OF PETITIONERS'S SECOND CIRCUIT BRIEF AS APPELLANTS IN APPEAL NUMBER 95-7183 . . . . . 56a

SEPTEMBER 29, 1994 DISTRICT COURT ORDER IN THE DISTAJO CONSOLIDATED CASES DENYING DEFENDANTS' MOTIONS TO DISMISS 56a

NOVEMBER 10, 1994 DISTRICT COURT ORDER IN THE DISTAJO CONSOLIDATED CASES COMPELLING THE DEFENDANTS TO ARBITRATE 74a

NOVEMBER 22, 1994 DISTRICT COURT ORDER IN THE DISTAJO CONSOLIDATED CASES ENTERING A TEMPORARY RESTRAINING ORDER AGAINST THE DEFENDANTS . . . . . 8[illegible]a

DECEMBER 9, 1994 DISTRICT COURT ORDER IN THE DISTAJO CASES ENTERING A PRELIMINARY INJUNCTION AGAINST THE DEFENDANTS 89a
(Reported at Doctors's Associates, Inc. v. Distajo, et al. 870 F.Supp. 870 (D.C. Conn 1994).

FEBRUARY 13 DISTRICT COURT ORDER BY ENDORSEMENT IN THE BICKEL CASE GRANTING THE PETITION TO COMPEL ARBITRATION. 96a

TABLE OF CONTENTS (continued)

Page

FEBRUARY 13, 1995 DISTRICT COURT ORDER BY ENDORSEMENT IN THE BICKEL CASE ENTERING A PRELIMINARY INJUNCTION AGAINST THE DEFENDANTS. . . . 97a

FEBRUARY 13, 1995 DISTRICT COURT ORAL ORDER, IN THE BICKEL CASE, WITH RESPECT TO THE PRELIMINARY INJUNCTION 97a

NOTE: THE BICKELS' BRIEF AS APPELLANTS WAS ON FILE BEFORE THE DISTRICT COURT ENTERED THE MAY 9, 1995 FORMAL, WRITTEN PRELIMINARY INJUNCTION 102a

MAY 9, 1995 DISTRICT COURT ORDER IN THE BICKEL CASE, ENJOINING THE DEFENDANTS 102a

ARGUMENT POINT VI IN THE SECOND CIRCUIT BRIEF OF DISTAJO, ET AL. AS APPELLANTS

POINT VI: IN THE ALTERNATIVE, THE DISTRICT COURT ERRED BY FAILING TO ABSTAIN FROM EXERCISING JURISDICTION

POINT VII: THE DISTRICT COURT ERRED BY FAILING TO ABSTAIN FROM EXERCISING JURISDICTION

SEPTEMBER 29, 1994 ORDER RULING ON PENDING MOTIONS, DENYING DAI'S MOTION FOR A PRELIMINARY INJUNCTION, DENYING DAI'S MOTION FOR A HEARING, ON THE PETITIONERS TO COMPEL ARBITRATIONS, DENYING THE MOTIONS OF THE DEFENDANTS TO DISMISS AND ORDERING THAT ANY RESPONSIVE PLEADINGS TO THE PETITIONS TO COMPEL ARBITRATION BE FILED BY OCTOBER 14, 1994

RULING ON PENDING MOTIONS

Plaintiff filed a petition to compel arbitration pursuant to the Federal Arbitration Act (FAA) 9 U.S.C. § 4, and subsequently an application for a Temporary Resisting Order and a Preliminary Injunction. Defendants have filed various motions to dismiss, to transfer and for a hearing on the matter.

BACKGROUND

Plaintiff, Doctor's Associates, Inc. (DAI) is the national franchisor of "Subway" sandwich shops, and is a Florida corporation. DAI entered into written franchise agreements with defendants, permitting them to operate a Subway restaurant. The agreements contain an arbitration clause (paragraph 10c) which reads as follows:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceeding by an aggrieved party to settle disputes arising out or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

Defendants have filed suit against plaintiff, affiliated individuals and

entities in various state courts. Plaintiff demanded arbitration of defendants' claims by the American Arbitration Association in accordance with the arbitration clause. Defendants have refused to arbitrate, and therefore plaintiff petitioner here for an order directing defendants to arbitrate. Plaintiff moved for a temporary restraining order and for a preliminary injunction to stay the state court proceedings until this court could rule on the petitions to compel arbitration. On September 13, 1994 a hearing was held as to whether a preliminary injunction should enter. The temporary restraining order has expired.

DISCUSSION

1) Motions for a Hearing

Plaintiff's motions for a hearing on the petition to compel arbitration and on the motions to dismiss are denied.

2) Motions to Dismiss

A motion to dismiss under Rule 12(b)(6)

must be decided solely on the facts alleged. Goldman v. Belden, 754 F.2d 1059, 1065-66 (2d Cir. 1985). such a motion should be granted only where no set of facts consistent with the allegations could be proven entitling plaintiffs to relief. Conley v. Gibsen, 355 U.S. 41, 45-46 (1957). The issue is not whether plaintiffs will prevail, but whether they should be afforded the opportunity to offer evidence to prove their claims. Id.

A) Local Rule 9

The motion to dismiss filed in 3:94cv00370 Doctor's Associates v. Smith (doc. #5) and 3:94cv00369 Doctor's Associates v. Gillon (doc. #7) are denied for failure to file an accompanying memorandum of law as required by Local Rule 9.

B) Subject Matter Jurisdiction

Several of the defendants claim that this court does not have jurisdiction over

the subject matter of the action because there is not complete diversity, as certain development agents of DAI doing business in the same states that defendants reside must be joined as plaintiffs in the various actions.[1] However, they are not parties to

---

[1] Defendants in 3:94cs00515 Doctor's Associates v. Youmaran, 3:94cv00803 Doctor's Associates v. Brenes, 3:94cv00514 Doctor's Associates v. Guerro, 3:94cv00516 Doctor's Associates v. Shino, 3:94cv00517 Doctors Associates, Inc. v. Loenneke. 3:94cv00349 Doctor's Associates v. Distajo, 3:84cv1457 Doctor's Associates Papaleo and Doctor's Associates v. Rothmund are residents of Illinois. They allege that Phil Mesi and Subway Development of Chicagoland, Inc., both development agents of DAI and residents of Illinois are indispensable parties under Red.R.Civ.P. 19(b). Defendants in 3:94cv00998 Doctor's Associates v. Kane are residents of Massachusetts. They allege that Michael and Jane Eslinger and Jams, Inc., development agents of DAI and residents of Massachusetts, are indispensable parties. Defendant in 3:94cv00803 Doctor's Associates v. Johnson is a resident of North Carolina. He alleges that Peter Slomianyj and North Carolina Subway Group, development agents of DAI and resident of North Carolina are indispensable parties. Defendant in 3:94cv1108 Doctor's Associates v. Giannini is a resident of Pennsylvania. He alleges that J.B. Jung and Subway Development

the contract that is at issue int he instant action. "Fed.R.Civ.P 19 does not require the joinder of parties merely because they played some part in the underlying events of a dispute, but only if such parties are necessary in order to grant complete relief or if they would be prejudiced by not being joined." Argo Partners, Inc. v. Littlefield, Adams & Co., 1994 WL 320616 (S.D.N.Y.). "Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." Moses H. Cone

---

Corporation of Philadelphia, development agents of DAI and residents of Pennsylvania are indispensable parties. Defendants in Doctor's Associates v. McCrary, Doctors Associates v. Gillon, Doctor's Associates v. Smith, Doctor's Associates v. Riise, and Doctor's Associates v. Benton are residents of Alabama. They allege that Bernardo Frausto and Subway Development of Northern Alabama, development agents for DAI and residents of Alabama are indispensable parties.

Hospital v. Mercury Construction Corp., 460 U.S. 1, 20 (1983). See also Steinberg & Lyman v. Takacs, 774 F.Supp. 885 (S.D.N.Y. 1991) (parties to an arbitration agreement must arbitrate even though there are other defendants to the action). There would be no prejudice to the various development agents by not joining them, as they are not parties to the agreement in question and the underlying litigation would proceed as to those parties even if the litigation as to Doctor's Associates and the defendants in this action was stayed. This action to enforce an agreement by the defendants to arbitrate does not require joinder to the additional parties. The motions to dismiss in 3:94cv00349 Doctor's Associates v. Distajo (doc. #s 31, 33, 35, 37, 39 and 46) are denied in their entirety as they relate solely to this issue of subject matter jurisdiction.

C) Personal Jurisdiction/Venue

Defendants contend that this court lacks personal jurisdiction over them and that venue is not proper.[2] These arguments are without merit. In accordance with the arbitration agreement, defendants "subjected [themselves] in advance, to the jurisdiction of the court within whose territorial jurisdiction the arbitration proceedings are to be had . . . ." Hatzlachh Supply Inc. v. Moishe's Electronics, Inc., 848 F.Supp. 25 (S.D.N.Y. 1994); Farr & Co. v. Cia Intercontinental De Navegacion De Cuba, 243 F.2d 342, 346 (2d Cir. 1957). The arbitration agreement also includes a choice

---

[2]Defendants assert this argument in the following cases:
3:94cv00515 Doctor's Associates v. Youmaran
3:94cv00998 Doctor's Associates v. Kane
3:94cv00514 Doctor's Associates v. Guerro
3:94cv00803 Doctor's Associates v. Brenes
3:94cv01108 Doctor's Associates v. Gianni
3:94cv00516 Doctor's Associates v. Shino
3:94cv00517 Doctor's Associates v. Loenneke
3:94cv00349 Doctor's Associates v. Distajo
3:94cv00803 Doctor's Associates v. Johnson

of forum clause, stating that the parties are to settle any disputes in Connecticut Such advance consent waives any objection to personal jurisdiction and venue.

D) Abstention

Defendants contend, in a conclusory manner, that this court should decline to exercise jurisdiction over the matter under the doctrine of abstention, citing Colorado River Water Conservation District v. United States, 424 U.S. 800, 813-17 (1976).[3]

---

[3]The following defendants assert this argument:
3:94cv00151 Doctor's Associates v. Youmaran (doc. #4)
3:94cv00803 Doctor's Associates v. Brenes (doc. #4)
3:94cv00514 Doctor's Associates v. Guerro (doc. #4)
3:94cv00516 Doctor's Associates v. Shino (doc. #6)
3:94cv00517 Doctor's Associates v. Loenneke (doc. #5)
3:94cv00349 Doctor's Associates v. Distajo (doc. #18)
3:94cv00998 Doctor's Associates v. Kane (doc. #3)
3:94cv01108 Doctor's Associates v. Gianni (doc.#4)

Federal courts generally do not dismiss proceedings merely because the circumstances will compel a federal court to relinquish jurisdiction due to parallel proceedings in state court. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 13-14 (1983). Defendants claim that proceedings in over nine cases in state court constitute compelling circumstances. There is nothing remarkable about parallel state litigation. Although it is not entirely clear how extraordinary the circumstances must be in order for the court to decline to exercise its jurisdiction in this context, it is clear that parallel proceedings alone is not sufficient. See Id.; Erwin Chmreinsky, Federal Jurisdiction at 669 (4th Ed. 1989) (listing cases in which courts abstained due to varying circumstances). Defendants have not enumerated exceptional circumstances that arrant dismissal in deference to the state court litigation.

E) Res Judicata and Collateral Estoppel

Defendant in Doctor's Associates v. Johnson alleges that res judicata or collateral estoppel precludes jurisdiction here over the matter because the Northern Carolina trial court in which a complaint was filed declined to stay the lawsuit. These orders are on appeal, and therefore they do not constitute a final judgment on the merits. Therefore res judicata does not apply. See Allen v. McCurry, 449 U.S. 90, 94 (1980). Collateral estoppel applies only to issues decided finally in another forum. Jim Beam Brands Co. v. Crawford, Ltd. 937 F.2d 729, 734 (2d Cir. 1991, Even if these orders were to be considered final, a denial of a motion to stay does not preclude a petition to compel arbitration pursuant to § 4 of the FAA. See In re Pahlberg Petition, 131 F.2d 968, 969 (2d Cir. 19).

Defendants in Doctor's Associates v. McCrary allege that an Alabama state court

had determined the arbitration clause to be void and unenforceable and therefore these issues may not be relitigated in this forum. There is currently pending amotion to reconsider the judgment in the state court. Consequently, there is not a final judgment, as discussed above and the doctrines of res judicata and collateral estoppel do not apply.

4) Motion for Preliminary Injunction

Plaintiffs move for a preliminary injunction to enjoin defendants from moving forward with their respective cases in state court. Defendant claims that this court cannot grant the relief requested under the provisions of U.S.C. § 2283 (the "Anti-Injunction Act").

The Anti-Injunction Act was promulgated to balance the tensions between state and federal courts in a dual system, eliminating inevitable friction that may occur when both state and federal courts entertain

proceedings. As the Supreme Court had noted, state proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any through the state appellate courts and ultimately this Court." Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281, 287 (1970).

Injunctions can issue against state proceedings in certain limited situations, "namely, when expressly authorized by statute, necessary in aid of the court's jurisdiction, or necessary to protect or effectuate the court's judgment." Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988). The exceptions are narrow and "'not [to] be enlarged by loose statutory construction.'" Id. (quoting Atlantic 398 U.S. at 146). As there is neither statutory authority for entry of an injunction nor a judgment which the court seeks to

effectuate, the question is whether this court can enjoin the state proceedings in aid of its jurisdiction.

In the present action, the state and federal court have concurrent jurisdiction and consequently neither court is "free to prevent either party from simultaneously pursuing claims in both courts." Atlantic 398 U.S. at 295.

> Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment in rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by application of the principles of res judicata.

Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977). Additionally, the Supreme Court has limited the "in aid of jurisdiction" exception only to cases in which a federal court acquired jurisdiction over real property, but had not extended it to proceedings involving in personam jurisdiction. Atlantic 398 U.S. at 295-96.

As the state court proceedings do not impair this court's jurisdiction to proceed, and there is not dispute as to real property, an injunction is not appropriate.

Exceptions to the Anti-Injunction Act recognized in the Second Circuit also do not apply to the present situation. The Act has been found not to apply when state court proceedings have not been instituted. Standard Microsystems v. Texas Instruments, 916 F.2d 58, 61 (2d Cir. 1990). However, each of the consolidated cases have pending litigation in a state court, and the act bars "an injunction to stay proceedings in a state court." 28 U.S.C. § 2283 (emphasis added). The Second Circuit has cast doubt as to the validity of another exception formulated in the Seventh Circuit in Barancik Investors Funding Corp., 489 F.2d 933 (7th Cir. 1973), which allowed an injunction if the state court proceedings were instituted after a motion was filed to

enjoin it, but before the court ruled on it. See Standard Microsystems, 916 F.2d at 61. The facts here do not support such an argument as the state court litigation was commenced prior to plaintiff's application for preliminary injunction.

The motion for a preliminary injunction (doc. #59) is denied as the action does not fall within any of the narrow exceptions to the Anti-Injunction Act. According, defendants' motions to file responsive pleadings in state court are granted.

Conclusion

The following motions to dismiss are denied:

3:94cv00349 Doctor's Associates v. Distajo (doc. #s 4, 18, 31, 33, 35, 37, 39, 46, 53, 84, 86, 89)
3:94cv00369 Doctor's Associates v. Gillon (doc. #7)
3:94cv00370 Doctor's Associates v. Smith (doc #5)
3:94cv00511 Doctor's Associates v. Brenes (doc. #4)
3:94cv00514 Doctor's Associates v. Guerro (doc. #4)
3:94cv00515 Doctor's Associates v. Youmaran (doc. #4)
3:94cv00516 Doctor's Associates v. Shino (doc. #6)

3:94cv00517 Doctor's Associates v. Loenneke (doc. #5)
3:94cv00803 Doctor's Associates v. Kane (doc. #3)
3:94cv01108 Doctor's Associates v. Gianni (doc. #4)
3:94cv1457 Doctor's Associates v. Papaleo (doc. #5)

The following motions for hearing are denied:
3:94cv00349 Doctor's Associates v. Distajo (doc. # 21 & 50)
3:94cv00354 Doctor's Associates v. McCrary (doc. #9)
3:94cv00369 Doctor's Associates v. Gillon (doc. #9)
3:94cv00370 Doctor's Associate v. Smith (doc. #8)
3:94cv00371 Doctor's Associates v. Riise (doc. #10)
3:94cv00372 Doctor's Associates v. Benton (doc. #8)
3:94cv00511 Doctor's Associates v. Brenes (doc. #8)
3:94cv00514 Doctor's Associates v. Guerrero (doc. #8)
3:94cv00515 Doctor's Associates v. Youmaran (doc. #8)
3:94cv00516 Doctor's Associates v. Shino (doc. #7)
3:94cv00517 Doctor's Associates v. Loenneke (doc. #8)

The following motions to file documents in pending state proceedings are granted. Doctor's Associates v. Distajo, 3:94cv00349 (doc. #s 72, 73, 74, 77, 78, 79, 80) The Motion for leave to file a supplemental

memorandum of law in support of the motion to dismiss for lack of venue 3:94cv00511 Doctor's Associates v. Brenes (doc. #7) is granted, and was considered. The motion to transfer venue, Doctor's Associates v. Distajo 3:94cv00349 (#8), is denied. The motion for preliminary injunction Doctor's Associates v. Distajo 3:94cv00349 (#59) is denied.

Any responsive pleadings to the petitioner to compel arbitration shall be filed on or before October 14, 1994. The petitioner shall be decided on the record as of that date.

SO ORDERED.

Dated an New Haven, Connecticut, this 29th day of September, 1994.

Peter C. Dorsey
United States
District Judge

NOVEMBER 10, 1994 ORDER COMPELLING DEFENDANTS TO ARBITRATE IN ALL 16 CASES & DISMISSING THE CONSOLIDATED CASE, WITHOUT PREJUDICE TO EITHER SIDE TO REOPEN AS NECESSARY

RULING ON PETITIONS TO COMPEL ARBITRATION

Plaintiff seeks to compel arbitration pursuant to the Federal Arbitration Act (FAA) 9 U.S.C. §4. Defendants have raised various defenses.

Background

Doctor's Associates, Inc. (DAI) the national franchisor of "Subway" sandwich shops, is a Florida corporation. DAI entered into written franchise agreements with defendants, permitting them to operate Subway shops. The agreements contain an arbitration clause (paragraph 10c) which reads:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be

> entered in any Court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out or to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

Defendants have sued plaintiff, affiliated individuals and entities in various state courts. Plaintiff demanded arbitration of defendants' claims by the American Arbitration Association in accordance with the arbitration clause. Defendants have refused to arbitrate. Plaintiff petitions here for an order that defendants arbitrate. Defendants have filed various motions to dismiss, which were denied. Plaintiff moved for a preliminary injunction to stay state court litigation pending a decision or this case, which was denied.

Discussion

Section 4 of the FAA enables a party to seek in federal courts an order that a party arbitrate a dispute. An action may be

brought by "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." A court must order arbitration if it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." Id. A court must conduct a limited review to determine whether a valid agreement to arbitrate exists and if the dispute falls within the scope of that agreement. AT & T Technologies v. Communications Workers of America, 475 U.S. 643, 649 (1986). If the court "determines that an agreement exists and that the dispute falls within the scope of the agreement, it then must refer the matter to arbitration without considering the merits of the dispute. Painewebber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990).

Defendants do not dispute the written agreement but they argue that they are not

obligated to participate in arbitration. They allege that a valid agreement as to arbitration does not exist for lack of mutuality, fraudulent misrepresentation, waiver, unconscionability, that the clause is a contract of adhesion, and for unfair trade practices pursuant to the Federal Trade Commission Act, 15 U.S.C. § 45/ They also challenge this court's jurisdiction and venue and invoke res judicata and collateral estoppel. The issues of jurisdiction, venue, res judicata and collateral estoppel were addressed previously and will not be reconsidered.

A) Lack of Mutuality

Defendants contend that the arbitration clause is void for lacks mutuality in that DAI and the franchisee must arbitrate all disputes arising out of or relating to the franchise agreements. See Kroll v. Doctor's Associates, Inc., 3 F.3d 1167, 1171 (7th Cir. 1993). Defendants claim that the

development agents for DAI, acting as DAI's "alter-egos," are a means by which DAI avoids the duty to arbitrate certain disputes arising out of or related to the agreement. They allege that the development agents, wholly owned by DAI, reserve the right to bring summary eviction actions or other legal proceedings. DAI, acting through such agents, thus has the right, de facto, to initiate proceedings other than arbitration. Consequently, defendants argue, there is an issue of lack of mutuality which must be submitted to a jury.

The threshold determination is whether the development agents operating in various states, are indeed the "alter egos" of DAI. This is a matter of law. If it is determined that the agents are not part of DAI, then the arbitration clause will be enforceable only as to DAI and the defendants, obliging them to arbitrate, thus establishing mutuality. If the agents are

determined to be part of DAI then as its "alter egos," the agents also would be obliged under the arbitration clause. Either way, mutuality is not an issue. As the determination of whether agents are "alter egos" of DAI is a matter of law, it is most appropriately left to the decision of the arbitrator.

B) Waiver

Defendants allege that DAI had waived arbitration by virtue of its extensive participation in the various lawsuits. In determining whether a party has waived arbitration, the extent of the party's participation in the lawsuit, its action have been inconsistent with the right to compel arbitration, whether the litigation process has been substantial, any long delay in seeking arbitration, whether movant (in this case, the plaintiff) filed claims without seeking arbitration, whether discovery has occurred, and whether the

other party would be prejudiced by the delay must be considered. See Jones Motor Co. v. Chauffers Teamsters & Helpers Local Union No. 633, 671 F.2d 38, 44 (1st Cir.) cert. denied, 459 U.S. 943 (1982).

In the state court actions, the leasing companies invariably commenced eviction proceedings in which franchisees asserted complaints against the leasing companies and DAI. DAI claims that it filed arbitration demands with the FAA and invoked its arbitration rights early in the proceedings. Defendants allege that because the leasing companies are in fact part of DAI, DAI should be held not to have invoked arbitration rights until well into the litigation.

"The rule of this circuit . . . if that the litigation of substantial issues going to the merits may constitute a waiver of arbitration." Sweater Bee By Banff v. Manhattan Industries, 754 F.2d 457, 461 (2d

Cir. 1985). "[N]o waiver can ordinarily be found where a party raises arbitration in its answer and moves promptly for a stay." Id. If the leasing companies are not considered part of DAI, then DAI did indeed invoke their arbitration rights from the beginning of their involvement in the proceedings, and will not be deemed as waiving them. If the leasing companies are to be considered part of DAI, the proceedings commenced by them were related to the leases. The more general questions as to the franchise agreements were raised by franchisees when DAI was brought into the cases. The right to arbitrate the latter dispute was raised when DAI became a party to the suits. As soon as a franchisee named DAI as a party, soon after the commencement of the proceedings, DAI asserted its arbitration rights. It is not penalized for defending a lawsuit after an adverse determination in some cases, or because a

state court has not reached the issues of arbitrability in others. If cannot be held to have waived a right of arbitration by an after-the-fact holding that it is the alter ego of the leasing companies. Accordingly, DAI has not waived its right to arbitration.

C) Fraudulent Misrepresentation

Defendants argue that DAI fraudulently misrepresented that arbitration was a condition precedent to the institution of a legal action by either party to the franchise agreement, but in fact had reserved the right to bring summary eviction actions and other legal proceedings against the franchisees. They also claim that DAI failed to disclose that it had a customer and practice of bringing summary eviction proceedings and other legal proceedings for alleged violations of the Franchise Agreement.

These allegations would be pertinent only if the development agents are

determined to be alter egos of DAI. As indicated previously, this decision is best left to the arbitrator; it will not be considered here.

D) Unconscionable

Defendants allege that the arbitration clause is void and unenforceable because it is unconscionable as it requires defendants, residents or various states, to arbitrate all disputes with plaintiff, a Florida corporation, in Connecticut.

The doctrine of unconscionability prevents oppression and unfair surprise. Edart Truck Rental Corp. v. B. Swirsky & Co., 23 Conn.App. 137, 142 (1990) (citing J. Calamari & J. Perillo, Contracts (3d Ed.) § 9-40). If the clause is unconscionably one-sided under the circumstances existing at the making of the contract, it is unenforceable. Edart, 23 Conn.App. at 142. "[P]laintiff's actions must be weighed against the defendant's business experience,

the business practices of the community, and the relatively equal bargaining power of the parties." Id. at 143. the record as to this issue is sparse, but it is sufficient for the limited determination to be made here. Defendants were not uneducated consumers. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). They were business people investing in a franchise. It is assumed that they reviewed the franchise agreement, including the arbitration clause, prior to signing it. The language was not placed obscurely in fine print. There is no suggestion of DAI's overreaching. What is shown is a clearly stated agreement, openly accepted by defendants. The clause is not unconscionable.

E) Contract of Adhesion

Defendants allege that the arbitration clause is void and unenforceable as a contract of adhesion in that the terms were

not negotiated by the parties, that plaintiff drafted the clause, and that plaintiff was in a dominant position due to its superior economic power. They also allege that the clause did not meet their reasonable expectations, they were not informed that they would be waiving a right to a jury trial and subjects them to large expenses associated with arbitration which are much higher than litigation expenses.

"The hallmark of a contract of adhesion is that its terms 'are not subject to the normal bargaining processes of ordinary contracts.'" Dainty Rubbish Service, Inc. v. Beacon Hill Assn., Inc., 32 Conn. App. 530, 535 (1993) (quoting Aetna Casualty & Surety Co. v. Murphy, 206 Conn. 409, 416 (1988)). There are no allegations that the parties were not able to bargain over this clause in the ordinary course of negotiations. There is no suggestion that defendants did not freely choose to enter the agreements.

Parties were able to negotiate the terms of the arbitration agreement; it is irrelevant that plaintiff drafted the provision and had a superior economic position. Certainly it is not relevant to this claim that plaintiff did not inform defendants of all the ramifications that might or might not materialize due to an agreement with this clause. Accordingly, it is found that the clause is not a contract of adhesion.

F) Federal Trade Commission Act

Defendants argue that the arbitration clause is void and unenforceable as it violates the prohibition against unfair trade practices of the FTCA in that it places a substantial burden and onerous costs on defendant. There is no private right of action under 15 U.S.C. § 45 or the FTC regulations. See American Airlines v. Christensen, 967 F.2d 410, 414 (10th Cir. 1992).

Conclusion

Plaintiff's petition that defendants be ordered to arbitrate their claims under the franchise agreement is granted. This case is referred to arbitration in accordance with the arbitration clause contained in the franchise agreement. Accordingly, the case is dismissed without prejudice to either side to either side to reopen as necessary for the protection or assertion of rights by either side subsequent to the arbitration proceedings.

SO ORDERED.

Dated at New Haven, Connecticut, this 9th day of November, 1994.

Peter C. Dorsey
United States
District Judge

NOVEMBER 22, 1994 DISTRICT COURT ORDER IN THE DISTAJO CONSOLIDATED CASES ENTERING A TEMPORARY RESTRAINING ORDER AGAINST THE DEFENDANTS

TEMPORARY RESTRAINING ORDER

The Court, having heard the parties and having read the reporting affidavit, exhibits and memorandum of law and it appearing that there is likelihood that plaintiff Doctor's Associates, Inc. ("DAI") will suffer immediate, substantial and irreparable harm and injury to its rights under section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, to compel arbitration if defendants' state court actions are not temporarily enjoined, it is hereby

ORDERED, that service of this temporary restraining order and related papers to be made upon defendants' attorneys on or before 23 November, 1994; and it is further

ORDERED that no bond shall be required in the circumstances of this case.

Entered at New Haven, Connecticut, this

22nd of November, 1994 at 1:30 o'clock/p.m.

Peter C. Dorsey
United States District Judge

DECEMBER 9, 1994 ORDER GRANTING DAI'S NOVEMBER 22, 1994 PETITION FOR A PRELIMINARY INJUNCTION, AND ENJOINING THE DEFENDANTS FROM PROCEEDING FURTHER WITH THE 16 STATE COURT ACTIONS, PENDING TO ARBITRATION

(Reported at Doctors's Associates, Inc. v. Distajo, et al. 870 F.Supp. 870 (D.C. Conn 1994).

RULING ON PENDING MOTIONS

After entry of a temporary restraining order prohibiting defendants from pursing various state court actions, a hearing to show cause why a preliminary injunction should not enter was held on November 29, 1994. Defendants[1] move to vacate the

---

[1] The following defendants bring this motion:

3:94cv01457 Doctor's Associates v. Papaleo
3:94cv01456 Doctor's Associates v. Rothmund
3:94cv00349 Doctor's Associates v. Distajo
3:94cv00516 Doctor's Associates v. Shino
3:94cv00514 Doctor's Associates v. Guerrero
3:94cv00948 Doctor's Associates v. Kane

temporary restraining order and oppose plaintiff's motion for preliminary injunction.

Background

Doctor's Associates, Inc. (DAI) the national franchisor of "Subway" sandwich shops, is a Florida corporation. DAI entered into written franchise agreement with defendants, permitting them to operate Subway shops. The agreements contain an arbitration clause (paragraph 10c) which reads:

3:94cv01108 Doctor's Associates v. Giannini
3:94cv00803 Doctor's Associates v. Johnson
3:94cv00517 Doctor's Associates v. Loenneke
3:94cv00515 Doctor's Associates v. Youmaran
3:94cv00511 Doctor's Associates v. Brenes

The "Alabama defendants did not join in the motion. They are:

3:94cv00372 Doctor's Associates v. Benton
3:94cv00354 Doctor's Associates v. McCrary
3:94cv00370 Doctor's Associates v. Smith
3:94cv00371 Doctor's Associates v. Riise
3:94cv00369 Doctor's Associates v. Gillon

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such proceeding will be borne equally by the parties.

Defendants have sued plaintiff, affiliated individuals and entities in various state courts. Plaintiff demanded arbitration of defendants' claims by the American Arbitration Association in accordance with the arbitration clause. Defendants have refused to arbitrate. The matter has been ordered to arbitration. Plaintiff has moved to enjoin defendants from proceeding in state court with parallel litigation.

Discussion

A) Res Judicata/Collateral Estoppel

Defendants argue that res judicata and/or collateral estoppel bar this court from deciding the arbitration issue. Specifically, they content that an October 24, 1994 judgment of an Illinois state court[2] prevents relitigation of the issue, as Illinois law recognizes a trial court judgment as final for purposes of res judicata and collateral estoppel.

The full faith and credit statute, 28 U.s.C. § 1738 gives state court judgments the same preclusive affect as given by courts of the forum states. Marrese American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). Illinois law thus determines what preclusive effect is to be

---

[2]Defendants also cite certain Alabama decisions. Defendants effected by those decisions do not challenge a preliminary injunction. Those decisions will not be discussed here.

given to the October 24, 1994 decision.

Under Illinois law, preclusive effect is given to a final judgment on the merits. Pelon v. Wall, 262 Ill. App.3d 131, 135 (1994). "For res judicata purposes, a judgment is not final until the possibility of appellate review has been exhausted." Id. (citations omitted). Plaintiff has indicated that there is a motion for reconsideration pending in the Illinois case. As that motion is pending, and there is the possibility of appeals, the Illinois judgment does not preclude this court from either acting on the arbitration issue or ordering appropriate measures to effectuate its decisions.

B) Stay of State Court Proceedings

1) Federal Arbitration Act

Defendants first argue that this court cannot stay the underlying state actions pursuant to § 3 of the Federal Arbitration Act (FAA) as that section only allows a

court to stay a case when it has a pending suit before it. As there is no suit currently before the court, it is inappropriate for the court to use this section to stay litigation.

2) Anti-Injunction Act

Federal courts are generally prohibited from staying state court proceedings by the Anti-Injunction Statute, 28 U.S.C. § 2283. However, the statute provides that "[a] court of the United States may not grant an injunction to stay proceedings in judgments." Id. This exception is applicable where "a federal court has made [a] conclusive ruling [] and [its] effect may be undermined by threatened relitigation in state courts." Standard Microsystems v. Texas Instruments, 916 F.2d 58, 60 (2d Cir. 1990).

If has been held here that any dispute as to DAI, in accordance with the agreement, must be addressed in arbitration. Continued

litigation of these issues in parallel state proceedings will undermine, if not moot, this ruling, Further proceedings as to defendants' disputes with DAI, which have been determine not to belong in the courts, but in arbitration, may effect this court's judgment. Necchi Sewing Machine Sales Corp. v. Carl, 260 F.Supp. 665, 669 (S.D.N.Y 1966); see also McGuire, Cornwall & Blakey v. Grider, 765 F.Supp. 1048, 1052 (D.Colo. 1991); Hunt v. Mobil Oil Corp., 557 F.Supp. 368, 372 (S.D.N.Y. 1983).

Defendants have clearly manifested their intent to proceed with state court litigation despite the order of arbitration of their disputes with DAI. This continued action would impair the integrity of the order of arbitration. An injunction is not appropriate.

Conclusion

The motion for preliminary injunction (doc.

#120) is granted; the motion to vacate the temporary restraining order (doc. #127) is denied. Defendants shall be enjoined from proceeding with all related state court litigation pending arbitration.

SO ORDERED.

Dated at New, Connecticut, this 9th day of December, 1994.

Peter C. Dorsey
United States
District Judge

FEBRUARY 13, 1995 ENDORSEMENT GRANTING THE PETITIONER TO COMPEL ARBITRATION

PETITION TO COMPEL ARBITRATION

This is an action to compel arbitration pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4.

Handwritten endorsement: February 13, 1995 granted.

Peter C. Dorsey
U.S.D.J.

FEBRUARY 13, 1995 ENDORSEMENT GRANTING THE MOTION FOR PRELIMINARY INJUNCTION

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 65, Fed. R. Civ. P., and based on the memorandum of law filed herewith, plaintiff Doctor's Associates, Inc. ("DAI") moves for a preliminary injunction enjoining defendants, until further order of this Court, from prosecuting their states action.

handwritten endorsement: February 13, 1995 granted as per record in open court.

Peter C. Dorsey.
U.S.D.J.

FEBRUARY 13, 1995 DISTRICT COURT ORAL ORDER, IN THE BICKEL CASE, WITH RESPECT TO THE PRELIMINARY INJUNCTION

MR. DUNHAM [attorney for DAI]: I'll try to stop short of that. My request is this, and because we have not -- I just found out about this default judgment and I haven't had the change to review the papers, I'm not sure what Doctor's Associates may want to

do, but I would request that the preliminary injunction that you have just entered, enter without prejudice to the right of Doctor's Associates to go to court in Illinois for the limited purpose of vacating the default judgment. I don't know whether we're going to do it. We have to look at Illinois law which -- on this, which we haven't had the opportunity to do yet, but I don't want to get mousetrapped by Mr. Duree and the judge in Madison County here, and I think in fairness that would be appropriate under the circumstances.

THE COURT: All right. Anything else?

MR. DUNHAM: No litigation on the merits whatsoever, simply moving to vacate the default on the grounds that service was improper, and whatever other grounds are available under Illinois law.

THE COURT: All right, what I'll do is I'll endorse the preliminary injunction. what I would suggest is that since that is

not part of the order that you filed, rather than sign that order, Mr. Dunham, what I would suggest is you take it back.

MR. DUNHAM: Fine, we'll amend it.

THE COURT: And redraft and submit a further order following upon my granting of the preliminary injunction, and provided that it's in the form that you have here, plus the additional provision hat you talked about, so that Mr. Wocl is not prejudiced by having something snuck into a preliminary injunction that he didn't know about, and then provide him with a copy of it too, --

MR. DUNHAM: That's fine. We will today prepare a substitute order. We'll fax it to Mr. Wocl's office in Bridgeport so that he can see it this morning and have the opportunity to comment if he so chooses, and then we'll bring it back over to your chambers later today.

THE COURT: All right.

MR. WOCL: [attorney for Defendants]

Your Honor, so your granting this additional request for the limited purpose to vacate the default judgment?

THE COURT: Just for -- well, I'm not going to put it in terms of vacating the judgment. I'm going to permit them to make whatever procedural attack on what has entered, in whatever form they decide to do it. If they decide to move to vacate it, that's fine. If they decide to ignore it, that's up to them to, but the point is that it seems to me that it's not inappropriate even though I preclude any further prosecution of that matter, that I not prejudice them or leave them in a position where they might be prejudiced, but failing to take corrective action, because in following upon your earlier argument, it may be that some court says there is a further obligation to do something other than just leave a default judgment outstanding.

MR. WOCL: I understand that, Your

Honor. I just want to make sure we're on all fours with regard to the parameters of Doctor's Associates --

THE COURT: That [sic] all I have in mind.

MR. WOCL: Okay.

MR. DUNHAM: And that's all we were requesting.

THE COURT: That's what I understand is the request. Anything else Mr. Wocl, that you have any questions about?

MR. WOCL: No, Your Honor.

THE COURT: All right. Anything else I should deal with, Mr. Dunham?

MR. DUNHAM: No, Your Honor.

THE COURT: I'll endorse the motion for preliminary injunction as granted, as per the record in open court here this morning, so that will protect you, Mr. Wocl. It's on the record as to what additional was granted that isn't specifically spelled out, and that will protect you because, you know, my

recollection --

NOTE: THE BICKELS' BRIEF AS APPELLANTS WAS ON FILE BEFORE THE DISTRICT COURT ENTERED THE MAY 9, 1995 FORMAL, WRITTEN PRELIMINARY INJUNCTION

MAY 9, 1995 DISTRICT COURT ORDER IN THE BICKEL CASE, ENJOINING THE DEFENDANTS

ORDER FOR PRELIMINARY INJUNCTION

The Court, having heard the parties, and it appearing that there is a likelihood that plaintiff Doctor's Associates, Inc. ("DAI") will suffer immediate, substantial and irreparable harm and injury to its rights under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, if defendants' state court action is not temporarily enjoined, it is hereby

ORDERED that defendants are enjoined until further order of the Court from prosecuting their state action; and it is further

ORDERED that not bond shall be required in the circumstances of this case.

Nothing in this order shall preclude DAI or any of its co-defendants in the matter entitled Raymond and Sandra Bickel v. Subway Sandwich Shops, et al., 94-L-1248 from taking whatever steps are available under applicable Illinois law to vacate, appeal or otherwise challenge any default judgment(s) that have been entered by the Circuit Court of Madison County in that action.

Entered at New Haven, Connecticut, this 9th day of May, 1995.

Peter C. Dorsey
United States District Judge